

Viracon, Inc. and Miscellaneous Warehousemen, Airline, Automotive Parts, Service, Tire and Rental, Chemical and Petroleum, Ice, Paper and Related Clerical and Production Employees Union, Local No. 781, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 13-CA-20860

May 16, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On July 23, 1982, Administrative Law Judge Mary Ellen R. Benard issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Viracon, Inc., Bensenville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. In this regard Respondent contends, *inter alia*, that the Administrative Law Judge improperly discredited the testimony of its director of industrial relations, David Knutson, with respect to some matters, while nonetheless crediting his testimony with respect to others. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Further, as Judge Learned Hand observed in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), "nothing is more common in all kinds of judicial decisions than to believe some but not all" of a witness' testimony. We have carefully examined the record and find no basis for reversing the Administrative Law Judge's findings.

DECISION

STATEMENT OF THE CASE

MARY ELLEN R. BENARD, Administrative Law Judge: The original charge in this case was filed on February

266 NLRB No. 151

23, 1981,¹ by Miscellaneous Warehousemen, Airline, Automotive Parts, Service, Tire and Rental, Chemical and Petroleum, Ice, Paper and Related Clerical and Production Employees Union, Local No. 781, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, against Viracon, Inc., herein called Respondent. On March 31, the complaint issued alleging, in substance, that Respondent discharged and failed and refused to reinstate employee Margarita Negrete because of her union and/or other protected concerted activities and because she gave testimony before the Board, and that Respondent thus violated Section 8(a)(4), (3), and (1) of the Act. Respondent filed an answer in which it denied the commission of any unfair labor practices.

A hearing was held before me in Chicago, Illinois, on September 30 through October 2 and November 5, 1981. Thereafter, the General Counsel and Respondent filed briefs, which have been considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is an Illinois corporation which maintains various facilities, including one in Bensenville, Illinois, where it is engaged in the manufacture of insulated and tempered glass products. During the calendar or fiscal year preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, sold and shipped goods and materials valued in excess of \$50,000 directly from its Bensenville facility to enterprises located outside the State of Illinois. The answer admits, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act and I find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Negrete's Union Activity and Testimony Before the Board

Margarita Negrete was hired as an employee at the Bensenville facility in November 1973.² As detailed in *Viracon*, 256 NLRB 245 (1981), the Union began an organizing campaign at that plant in August 1979. During the course of the campaign Respondent committed numerous unfair labor practices and, in consequence, the Board, in *Viracon* above, ordered Respondent to bargain with the Union. Negrete, who had signed a union authorization

¹ All dates herein are the last 6 months of 1980 or the first 6 months of 1981 unless otherwise indicated.

² Negrete was hired by another firm which apparently occupied the Bensenville plant until Respondent began its operations there sometime around 1977, at which time she was hired by Respondent.

card and attended a union meeting, testified in the unfair labor practice proceeding. The Administrative Law Judge issued his Decision on November 26; certain findings in that Decision that Respondent had engaged in unlawful interrogation, solicited an employee to campaign against the Union, and had given the impression of surveillance of employees' union activities, were based on Negrete's testimony.

B. The Discharge of Negrete

1. Negrete's accident and subsequent absences from work³

Negrete credibly testified that about 5 o'clock on the morning of November 23 she fell in her apartment and lost consciousness for about 10 minutes. She also suffered a broken nose and a cut on her forehead. When Negrete regained consciousness she apparently went back to bed but then got up again and called a neighbor to take her to the hospital where she received stitches for the cut. Negrete further testified that as of November 25 she still felt so weak that she could not stand for any length of time and she therefore called a friend who came to her home and called an ambulance to take her to the hospital again. She was admitted to the hospital and stayed there until November 29. According to Negrete, when she was admitted to the hospital a nurse called Respondent at her request and apparently indicated the reasons for Negrete's absence from work. The following day Negrete called the factory and whoever answered the telephone told her to come back when she felt better.

On December 2 Negrete went to the office of Dr. David Ginsburg, who had been her attending physician while she was in the hospital, and he removed her stitches. She returned to work on December 9 and it is undisputed that no supervisor or management official of Respondent indicated that her absence was not excused.⁴

Negrete worked regularly from December 9 until January 6 when she started feeling "very dizzy." She called the factory and talked to Production Supervisor Donald Schmidt and told him that she was sick and had to see a doctor; according to Negrete's uncontradicted testimony,⁵ Schmidt told her to let him know as soon as she was ready to go back to work. Negrete then called Dr. Ginsburg's office and was told by personnel there that she was to call back on January 8, which she did, and saw Ginsburg on January 9. According to Ginsburg's office record of Negrete's visits, Negrete was "feeling dizzy since she fell. Feels like she is going to faint, nervous, hasn't been able to work all week." Ginsburg credi-

³ The findings in this section are based on the credible testimony of Negrete. Although she was often hesitant in replying to questions, I attribute this hesitancy to her difficulties with the English language and in remembering dates, rather than to any intent on her part to prevaricate or be evasive. On the whole, Negrete impressed me as a conscientious witness who testified to the best of her recollection.

⁴ Negrete credibly testified that when she returned to work on December 9 she had an excuse, apparently from Ginsburg. Although the document is not discussed in the record other than the one reference made by Negrete and is not in evidence, her testimony in this regard is not contradicted.

⁵ Schmidt did not testify. Although he was no longer employed by Respondent at the time of the hearing, there is no indication that he was not available to be called as a witness.

bly testified that he believed that he also told Negrete on January 9 that she should try staying off work for a week but that this instruction was not reflected in his record although normally it would have been.

Apparently on January 15, Negrete telephoned Ginsburg's office to request a release to go back to work and in consequence Ginsburg dictated the following excuse bearing that date:

Margarita Negrete has been under my care for a concussion. She may return to work 1/19/81.

D. Ginsburg, M.D.⁶

Ginsburg, M.D.

Negrete testified that on January 16 she tried to call Schmidt at the plant but that he was not in and so she talked to Benny,⁷ a leadman, and told him that she was returning to work on Monday, January 19. According to Negrete, Benny said that that was all right and that he would make sure that Schmidt knew.⁸

On January 18 Negrete received a mailgram from Schmidt with the following text:

Due to the fact that you have missed 21 days out of the last 52 working days, it is my intention to terminate you effective 1-16-81. If there are unusual mitigating circumstances that you wish to bring to my attention please contact me on Monday, 1-19-81 or Tuesday, 1-20-81. If I do not hear from you prior to Wednesday, 1-21-81, I will consider the termination to be final.

2. Negrete's suspension on January 19

Negrete returned to work on January 19, but when she arrived at the plant her timecard was not in the rack. She mentioned this fact to someone in the shipping department, apparently a leadman or foreman,⁹ and he said

⁶ Ginsburg also wrote a release for Negrete dated January 13, which stated as follows:

Margarita Negrete was off of work from 1/5-1/18/81 because she felt weak. This is probably related to her head injury.

David Knutson, Respondent's director of industrial relations, who, as discussed below, terminated Negrete, testified that he had never seen this document, the original of which was introduced into evidence by the General Counsel, until the instant hearing. Knutson also testified that Respondent's normal practice when employees bring excuses to the office is to keep the original and to give the employees back a copy as was undisputedly done with Negrete's other excuse from Ginsburg. Negrete, however, testified that she gave the January 13 excuse to "Julie," apparently Julie Stangle, a clerical employee who worked in personnel, along with the January 15 excuse from Ginsburg and some other medical forms for insurance purposes, and that Stangle made copies of the various documents and handed her back the originals. Stangle did not testify, although there is no indication that she was unavailable. I credit Negrete, and find that the January 13 excuse was turned over to Respondent, although, of course, the fact that Stangle saw it does not necessarily mean that Knutson did.

⁷ Benny's last name is not in the record.

⁸ I credit Negrete's testimony regarding this call for the reasons stated above. In addition, her testimony that she called the plant on January 16 is uncontradicted as Benny did not testify, although there is no indication that his identity was not known to Respondent or that he was unavailable.

⁹ Schmidt was not there when Negrete arrived at the plant.

he would take care of the problem. An hour later Schmidt stopped her from working and told her that she was suspended because she had missed 21 out of 52 working days. Negrete went to the office and asked Lee Allard¹⁰ about the situation and he sent her to David Knutson, Respondent's director of industrial relations. According to Negrete, Knutson told her that it was very unusual for her to miss this much work because she was sick, that the excuse from Ginsburg did not prove anything, and that she would have to go to a company doctor. Negrete explained that she had fallen and cut herself and broken her nose and had felt dizzy and weak but Knutson said that they wanted to send her to a company doctor "to make sure."

Knutson testified that on January 15 he was at the Bensenville plant on another matter¹¹ and Schmidt told him that he had received a call from Negrete 9 days earlier but he had not been able to get in touch with her since then although he had tried to do so. Knutson further testified that Schmidt said that he had the impression from questioning other employees that Negrete was out of town. Accordingly, Knutson drafted the telegram quoted above which was sent over for Schmidt's signature.¹²

According to Knutson, Negrete came in to the office along with Schmidt on January 19 and gave him a doctor's excuse dated January 15. When Negrete handed it to him she said that she had been feeling weak and had not been able to work because of the concussion. Knutson told her that he would have to have a qualified person make the judgment as to whether her excuse was valid and that if the company doctor validated it it would be considered a mitigating circumstance.¹³ Knutson also told Negrete that she was suspended until a determination was made about the validity of her excuse, but that if it was found valid she would be reinstated with no loss of seniority and with full pay for the time that she was suspended.

¹⁰ Although Allard was not identified in this record, he was Respondent's production manager at the time of the earlier unfair labor practice proceeding and it does not appear that his position changed subsequently.

¹¹ Knutson did not normally work out of the Bensenville facility but at the time of the events at issue visited that plant regularly.

¹² It is undisputed that Negrete had asked for time off over the holidays in December but had been told that if she took the time, she would not be paid for the holidays. Negrete testified that she therefore decided to stay and work. Negrete testified that in January, and specifically between January 6 and 19, she had a telephone at home, that Respondent had her telephone number, and that she was at home the whole time that she was ill. Knutson testified he had suggested to Schmidt that Negrete be contacted but Schmidt indicated that he had been unable to contact her by telephone because her telephone was disconnected and therefore Knutson suggested sending a telegram.

I credit Negrete for the reasons stated above. In making this finding, I note that to corroborate Knutson's testimony Respondent introduced into evidence a telegram to Schmidt from the customer relations department of Western Union which stated in substance as follows: "Your telegram of 01-16 to Margarita Negrete . . . is undelivered for the following reason: Phone given is disconnected none listed . . ." However, while this telegram indicates that no telephone number was listed under Negrete's name and that the number given to Western Union for her was disconnected, it does not establish that she did not have a telephone or that she had not given Respondent her correct number. Inasmuch as neither Schmidt nor any other personnel from the Bensenville plant testified, there is also no evidence that Negrete had not in fact informed appropriate plant personnel of her telephone number.

¹³ Knutson testified that under normal circumstances an employee would be discharged for being absent more than 3 days but an exception was made for Negrete because she was a long-term employee and because she brought in an excuse from Ginsburg. Thus, according to Knut-

son, the excuse itself did not constitute mitigating circumstances but it would be accepted as such if it was verified by a doctor selected by Respondent.

Also on January 19 Knutson wrote to Dr. Leo Pevsner, a physician whose practice is limited to industrial medicine and surgery, and to whom Respondent had referred employees in the past, asking him to request Negrete's medical records from Ginsburg, review them, "and tell us whether Ms. Negrete's length of absence was justified." Subsequently, Pevsner called Knutson and told him that Negrete would have to sign a release for medical information and consequently Respondent sent Negrete another mailgram on January 26 asking her to come to the plant "to further discuss your situation" on January 28. Negrete went to the plant on that date and Knutson explained that she needed to sign a release of her medical records from Ginsburg which she did. Negrete was also told that when Pevsner received the records he would call Julie Stangle, a clerical employee who performed personnel work, and set up an appointment for Negrete.

Pevsner examined Negrete on February 9. It is undisputed that at the time of that examination she was experiencing none of the symptoms of concussion. Pevsner prepared a report for Respondent in which he described the results of the tests he had performed on Negrete and stated that in his opinion Negrete should have recovered from the accident within a month after it occurred and that:

[Negrete] then should have been able to return [to] work somewhere between the 20th and 25th of December and continued to work without difficulty. It, therefore, appears that the patient's symptoms were motivated by other factors than the so-called concussion to gain more time away from her employment. In my opinion, this patient could have returned to work as indicated above, and any other absenteeism based both on the history, the medical records and clinical examination today, was unwarranted.

By telegram dated February 16 Respondent advised Negrete that "due to the conclusions made by Dr. Pevsner" she was terminated as of January 19.¹⁴

3. The medical evidence

Negrete testified that after she went back to work in December she felt "alright" but was weak and wanted something to make her stronger, that she then started feeling very weak as though she would faint, and that this condition continued until she decided on January 6 to again stay home from work. She also testified that she had headaches constantly and that around Christmas she felt "good" but in January she was again feeling dizzy. Ginsburg's office file on Negrete contains the notation dated January 8 "will see tomorrow for dizziness" and, as noted above, the notation for January 9 states, *inter*

son, the excuse itself did not constitute mitigating circumstances but it would be accepted as such if it was verified by a doctor selected by Respondent.

¹⁴ There is no contention that Respondent was dissatisfied with Negrete's work performance and Respondent advanced no reason other than her January absence from work for the termination. Negrete testified that she had received written warnings for tardiness in the past, but no such warnings were introduced into evidence and there is no contention that Respondent relied on them in deciding to discharge her.

alia, "feeling dizzy since she fell. Feels like she is going to faint, nervous, hasn't been able to work all week."

Ginsburg testified that on January 9 when he saw Negrete she said that she had been feeling dizzy since she was hospitalized and as if she was going to faint. According to Ginsburg he observed nothing which would cause him to disbelieve these complaints although he could not state with reasonable medical certainty whether her complaints were real. Ginsburg further testified that he thought Negrete's dizziness was probably related to her fall in November and that after the kind of head trauma she had received a patient may feel fine after a couple of weeks, but that some people still complain of symptoms, including headache, dizziness, and sometimes nausea and loss of balance several months later. Ginsburg further testified that based on his observation of Negrete when she was admitted to the hospital on November 25 she had a genuine concussion.

Pevsner testified that at the time he examined Negrete there was nothing wrong with her, although she may have had an injury in November, and that he was "puzzled" because she had been free of symptoms and then had them again, a situation which Pevsner had never seen, and that once a patient is free of symptoms from a concussion they do not recur. Consequently, according to Pevsner, it was unlikely that Negrete was off work from January 5 to 18 because she felt weak in consequence of her head injury as indicated in the January 13 excuse written by Ginsburg, because, inasmuch as she worked for 3 or 4 weeks before January 5, she had recovered from the concussion.

4. Respondent's practice with respect to employee absences and medical excuses

According to a memorandum dated August 1, 1979, and addressed to all employees from Kirt Melton, Respondent's general manager, on the subject "attendance policy," Respondent follows a progressive disciplinary system for employees' absences as follows: (1) One unexcused absence or two occasions of tardiness and/or unexcused early leave within a 30-day period will result in a written warning; (2) the second unexcused absence or a third occasion of tardiness or unexcused early leave in a 30-day period will constitute grounds for dismissal; and (3) the decision whether or not to discharge an employee is discretionary on the part of the supervisor. The memorandum further defines unexcused absence as "[a]ny absence which occurs, but the employee failed to give prior notice or failed to notify his/her supervisor by 9:00 a.m. of the day of the absence. Should the supervisor determine that the reason is insufficient, he is not obligated to excuse the absence. If he decides not to excuse the absence, the employee must be told immediately."¹⁵

The General Counsel introduced into evidence documents, including attendance records, employee change of status reports, warning notices, and medical excuses from

physicians, which appeared in the personnel files of employees and which were supplied by Respondent pursuant to subpoena.¹⁶ Specifically, the General Counsel introduced medical excuses from nine employees¹⁷ for dates ranging from January 21, 1979, through April 15, 1981. Knutson testified that he was unaware of any employee at the Bensenville plant other than Negrete who had presented a medical excuse which was not accepted by Respondent and that there have been no other instances where Respondent sent an employee to a physician for a nonwork related injury because the employee's excuse from his or her own physician was not believed.

¹⁶ Respondent contends that these documents are inadmissible because no proper foundation was laid for them and because they were hearsay and irrelevant and, in any event, it was prejudicial to introduce them without introducing other documents from the personnel files as well. I disagree. It is undisputed that all these documents were culled from personnel files maintained by Respondent and were supplied pursuant to subpoena. The medical excuses are all on printed forms bearing the letterhead of various physicians or medical clinics and there is no indication that Respondent, in including them in employees' personnel files, viewed these excuses as anything other than what they purport to be. Knutson referred to the attendance records, change of status reports (which record such events as an employee's hire, discharge, or promotion), and warning notices in his responses to questions from the General Counsel, thus raising the inference that he, as an agent of Respondent, considered these documents to be reliable records of employee attendance and of personnel actions taken by Respondent. Accordingly, I find that there is evidence sufficient within the meaning of Federal Rule of Evidence 901 to support a finding that these documents are what they purport to be. See *Alexander's Restaurant and Lounge v. NLRB*, 586 F.2d 1300 (9th Cir. 1978); *North Miami Convalescent Home*, 224 NLRB 1271, fn. 3 (1976). With respect to the hearsay issue, I consider the medical excuses only for the proposition that they were received by Respondent and considered by Respondent in making personnel decisions; in light of the discussion above, I find that the other documents are personnel records maintained by Respondent in the course of its regularly conducted business activity and that, pursuant to Federal Rule of Evidence 803(6), they are admissible for the truth of the statements in them, e.g., that named employees were hired, discharged, or disciplined on specified dates and that the stated reasons were given by Respondent for its actions. With respect to the question of relevance, the General Counsel contends, as discussed below, that Respondent treated Negrete differently from other employees because medical excuses furnished by other employees were accepted while Negrete's was not. Thus, employees' medical excuses and evidence as to what action Respondent took on the basis of them is clearly relevant. Finally, Respondent contends that "even if the evidence is relevant the prejudicial effect may outweigh the probative value of the evidence proffered and therefore not admissible [sic]. Also, one document or one file out of many documents or files may not be admissible where the purpose may be prejudicial unless all documents are produced." Federal Rule of Evidence 106 provides that "when a writing or recorded statement or parts thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Respondent contended at the time these documents were identified that a foundation was necessary to establish that they represented all the medical excuses in Respondent's files rather than a selected sampling. However, particularly in a situation where the documents offered are culled from files supplied by the adverse party, it seems appropriate to place the obligation on that party to demonstrate that there are other documents which "in fairness" should be considered contemporaneously. Respondent has not indicated what if any other documents should have been introduced and has cited no cases to support its proposition that introduction of the medical excuses was prejudicial to its case. I therefore find no merit to this contention.

¹⁷ Two excuses were offered pertaining to employee Raphael Cabrera, and three excuses for employee Rosa Mejia, including one dated January 18, 1980, which stated simply that Mejia "was unable to work from August 12 to September 3-79 (3 wks.) for medical reasons. She was under my care." A medical excuse was also admitted into evidence pertaining to Arling Pederson, who at the time was a supervisor.

¹⁵ Although the memorandum also instructs employees to "call [their] supervisor directly," Knutson credibly testified that if an employee calls the factory to report an absence and cannot reach his or her supervisor the employee is supposed to call a leadman. I therefore find that despite the statement on the memo, employees were not required to actually talk to their supervisor in order to avoid an absence being found unexcused.

Knutson also testified that he did not consider Negrete's injury a mitigating circumstance regarding her absence from work in January because prior to and during his college years Knutson had received five concussions and the condition claimed by Negrete did not coincide with his personal experience and knowledge about concussions. I do not credit Knutson's testimony that this was the reason he determined that Negrete should be sent to another physician. Knutson did not impress me as a straightforward witness but, rather, on several issues appeared to tailor his testimony to support Respondent's asserted defenses. Accordingly, without finding it necessary to determine whether Knutson in fact had had five concussions as a youth and in college, I find that his personal experience of concussions was not the reason he decided to require Negrete to be examined by a physician selected by Respondent.

With respect to Respondent's practice of discharging employees for attendance problems, the record contains documentary evidence of the discharges or other discipline of 10 employees in 1979.¹⁸ Three of these employees, Edwin Nicholas, Raymond Dangelmeier, and Bernard Dillard, were discharged but were rehired within about a month after their discharges;¹⁹ three others, Pat Daley, Dan Barry, and Leoncio Hernandez, who were discharged apparently without previous warning, had worked for Respondent less than 3 months at the time of their discharges;²⁰ Alexander Sambo and Victor Dayrit, whose length of employment with Respondent is not in the record, received written warnings for unexcused absences; and there is evidence that James Parker and Alex Allen were terminated for attendance problems and apparently not rehired. Parker was discharged on September 10, 1979, after receiving a written warning 3 weeks earlier for not calling in and a subsequent disciplinary 3-day suspension for an unexcused absence. There is no documentary evidence regarding the discharge of Allen, but Knutson credibly testified that he was terminated in August 1979 for excessive tardiness.²¹

There is also documentary evidence that two employees had excused absences for substantial periods of time. Luis Luna suffered an accident while off duty on November 22, 1979, and did not return to work until February 26, 1980; he then worked until he resigned on June 1, 1981. There is no evidence that he received a medical

excuse before returning to work or that any disciplinary action was taken against him for failure to produce such an excuse. Jose Alspuro²² was absent from work due to an accident at home from about November 5 to 14, 1980. A medical excuse in his personnel file stated simply that he could return to work on November 14. Alspuro was also on an excused leave of absence from February 25 through March 28, 1980, but no explanation of this excused absence appears in the record.

C. Analysis and Conclusion

The General Counsel contends that Negrete was discharged in reprisal for her union activity and for her testimony in the previous Board proceeding. Respondent contends, however, that Negrete was discharged because of her unexcused absence from work from January 6 until 19.

At the outset, it is important to emphasize that the issue in this case is not whether Negrete was in fact unable to work in January because of the injuries she had suffered in November, but whether Respondent believed, as of January 19, that she had no valid reason for her failure to be at work and that she had not notified Respondent that she would be absent, and whether Respondent discharged her for that reason.²³ As discussed above, it is undisputed that Respondent has not failed to accept medical excuses for the absence of any employee at the Bensenville facility other than Negrete. The sole evidence advanced by Respondent for its refusal to accept Negrete's excuse was Knutson's testimony that (1) based on his experience of concussions he could not consider her excuse mitigating circumstances without the testimony of a medical doctor; and (2) Schmidt told him on January 15 that he had received the impression from other employees that Negrete was not in town. As discussed above, I do not credit Knutson's testimony that the reason he was unwilling to accept Negrete's medical excuse was his personal experience with concussions. As to the second reason to which Knutson testified, although it is possible that Schmidt told Knutson January 15 that he thought Negrete was in fact out of the area, Negrete's testimony that she called the plant on January 16 is undisputed.²⁴ Interestingly, there is no evidence as to whether other employees (such as Luna or Alspuro) who were absent from work for substantial periods of time were required to call in regularly during their absence.

In view of the short lapse of time between issuance of the Administrative Law Judge's Decision in the previous proceeding and Respondent's decision to suspend Ne-

¹⁸ There is no evidence that employees were discharged or disciplined for this reason in 1980.

¹⁹ Nicholas received a written warning for tardiness the month after he was rehired and a 3-day suspension for the same reason 2 months after that, but there is no evidence that he was subsequently discharged.

²⁰ Daley was hired October 29, 1979. The document referring to his discharge is dated "10/2/79" but also bears the handwritten notation "input 11-5-79." I therefore infer that the date on the document is an error and that he was actually discharged November 2, 1979, 5 days after he began working for Respondent. Although the date on the document was discussed at the hearing, Respondent did not adduce any evidence or make any contention as to what the date should be.

²¹ Knutson testified that originals of warning slips given to Allen, who testified in the previous unfair labor practice proceeding, left Respondent's possession in the course of that case and were never returned. The General Counsel contends that Knutson's testimony regarding Allen is incredible. I disagree, but, as there is no evidence as to how long Allen was employed by Respondent or the extent or frequency of his tardiness, I find that there is no basis for comparing the circumstances surrounding his discharge with those surrounding the discharges of other employees.

²² Alspuro is also known as David Barbosa.

²³ Thus, even if Negrete were found to be ill in January, if Respondent discharged her in the mistaken belief that she was not, such a discharge would not run afoul of the Act.

²⁴ As stated earlier, neither Benny nor Schmidt testified, although there is no evidence that either individual was unavailable. As noted above, Knutson credibly testified that if an employee calls the factory to report an absence and cannot reach his or her supervisor the employee is supposed to call the leadman. Thus, for purposes of receiving telephone calls reporting absence, Benny was clearly an agent of Respondent and I therefore find that Negrete discharged her obligation to call in on January 16 and that Benny's knowledge of that call must be imputed to Respondent.

grete;²⁵ Respondent's animosity toward the Union, as evidenced in the earlier case;²⁶ the fact that Negrete, a longtime employee, was discharged without warning despite her proffer of a medical excuse, while employees who gave no excuses for their absences received warnings prior to being discharged, were subsequently rehired, or, if discharged without warning, had been employed by Respondent for very short periods of time; and the disparity in treatment between Negrete and other employees demonstrated by requiring her to have her excuse "validated" by examination by a physician of Respondent's choosing although Respondent had never imposed such a requirement on any other employee at the Bensenville plant; I find that the General Counsel has made a *prima facie* showing that Negrete's protected conduct was a "motivating factor" in Respondent's decision to discharge her.²⁷ Having discredited Knutson's testimony as to why he refused to accept Negrete's medical excuse, I further find that the reason Respondent suspended Negrete was not that Knutson had an honest belief that she had not in fact been ill as she claimed, but that Respondent was seeking some plausible justification for terminating her employment in retaliation for her giving of testimony adverse to Respondent in the earlier case.

Respondent's reliance on Dr. Pevsner's subsequent report concerning Negrete is misplaced, for, inasmuch as I have found that Respondent acted discriminatorily in sending Negrete to Pevsner for examination, any findings consequently made by Pevsner in that examination would not justify her subsequent discharge.²⁸ Accordingly, Respondent has not come forward with credible evidence to rebut the General Counsel's *prima facie* case. I therefore conclude that the General Counsel has established by a preponderance of the credible evidence that Negrete was discharged because she gave testimony adverse to Respondent at a Board hearing and that the discharge therefore violated Section 8(a)(4) and (1) of the Act. I further find that the intent and effect of the discharge was to discourage activity in support of the Union and that it therefore violated Section 8(a)(3) of the Act as well.²⁹

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Viracon, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

²⁵ None of the other employees who testified in that proceeding were in Respondent's employ by the time the Administrative Law Judge's Decision issued.

²⁶ It is clear that Respondent's prior unfair labor practices may properly be considered as background in the instant case. *Barnes and Noble Bookstores*, 237 NLRB 1247 (1978).

²⁷ *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1981); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

²⁸ I therefore find it unnecessary to pass upon the General Counsel's contention that Pevsner was an agent of Respondent in effectuating Negrete's discharge.

²⁹ *Seligman & Associates*, 240 NLRB 110, 120 (1970). I therefore find it unnecessary to determine how significant a role Negrete's union activity prior to the time she testified played in Respondent's decision to discharge her.

2. Miscellaneous Warehousemen, Airline, Automotive Parts, Service, Tire and Rental, Chemical and Petroleum, Ice, Paper and Related Clerical and Production Employees Union, Local No. 781, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employee Margarita Negrete and refusing to reinstate her because of her union and/or protected concerted activity and because she gave testimony under the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3), (4), and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

As I have found that Respondent unlawfully discharged Margarita Negrete, I shall recommend that Respondent be ordered to offer her immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed. I shall further recommend that Respondent be ordered to make her whole for any loss of earnings she may have suffered as a result of the discrimination against her by payment to her of the amount she normally would have earned from the date of her termination until the date of Respondent's offer of reinstatement, less net earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), to which shall be added interest, to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).³⁰ I shall also recommend, in accordance with the Board's recent decision in *Sterling Sugars*, 261 NLRB 472 (1982), that Respondent be ordered to expunge from its records any reference to Negrete's unlawful discharge and to provide written notice to her of that expunction and inform her that Respondent's unlawful conduct will not be used as a basis for future personnel action concerning her.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³¹

The Respondent, Viracon, Inc., Bensenville, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, because they engage in union and/or other protected con-

³⁰ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

³¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

certed activities or because they testify in proceedings under the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Margarita Negrete immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered as a result of Respondent's discrimination against her, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the discharge of Margarita Negrete on January 19, 1981, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Bensenville, Illinois, facility, copies of the attached notice marked "Appendix."³² Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

³² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees in regard to hire or tenure of employment, or any term or condition of employment, because they engage in union or other concerted activities or because they give testimony in proceedings brought under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activity.

WE WILL offer Margarita Negrete immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered as a result of our discrimination against her, with interest.

WE WILL expunge from our files any references to the disciplinary discharge of Margarita Negrete on January 19, 1981, and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

VIRACON, INC.